Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ALAN M. HOWARD, R. BORIS GREENBERG, KATHRYN PARAVENTI, and MERHDAD ETEMAD, on behalf of themselves, and on behalf of all others similarly situated,

Petitioners,

vs.

AMERICA ONLINE, INC., JAMES V. KIMSEY, STEPHEN M. CASE, and LENNERT J. LEADER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether America Online is a "common carrier" pursuant to the Federal Communications Act of 1934 and thereby subject to a tariff filing requirement regarding its Terms of Service?

Whether America Online may require its subscribers to grant it mandatory copyright licenses and other user rights in order to obtain its services?

PARTIES TO THE PROCEEDING

Petitioners are Alan M. Howard, R. Boris Greenberg, Kathryn Paraventi, and Merhdad Etemad, on behalf of themselves, and on behalf of all others similarly situated.

Respondents are America Online, Inc., James V. Kimsey, Stephen M. Case, and Lennert J. Leader.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. A) is reported at *Howard v. America Online, Inc.*, 208 F.3d 741 (9th Cir. 2000). The district court opinion granting Respondents'/Defendants' FED. R. CIV. PROC. 12(b)(6) Motion to Dismiss was not reported.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on March 29, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Federal Communications Act of 1934, 47 U.S.C. § 151 et seq. (1998), the pertinent parts of which are attached hereto at App. B.

This case also involves the copyright laws of the United States, 17 U.S.C. § 101 et seq. (1998), the pertinent parts of which are attached hereto at App. C.

STATEMENT OF THE CASE

A. The Services Offered By AOL And Claimed By Petitioners To Be "Common Carrier" Activities.

AOL is a publicly held corporation which provides a number of services to its subscribers, including E-mail, public forums, and access to the Internet. AOL is also an owner and backbone provider of the Internet itself. The services provided by AOL utilize the wire and radio communications networks of the United States.

Petitioners are subscribers to and have utilized the services of AOL in both their personal and professional capacities. Petitioners contend that AOL is a "common carrier" pursuant to the Federal Communications Act of 1934 and thereby subject to a tariff-filing requirement regarding its Terms of Service, and that it cannot unilaterally impose unreasonable terms of service, such as requiring subscribers to grant perpetual reproduction rights to subscribers' intellectual property.

B. Proceedings Below

On March 13, 1997, Petitioners filed their original complaint against America Online, Inc. Original jurisdiction was conferred upon the District Court as to the Federal questions raised in Appellants' complaint, pursuant to 28 U.S.C. § 1331 (1998), as to the Declaratory Relief requested therein, pursuant to 28 U.S.C. §§ 2201 and 2202 (1998), and as to the violations

of the Communications Act of 1934 (including failure on the part of Defendant AOL to file tariffs with the FCC), pursuant to 47 U.S.C. § 207 (1998). Jurisdiction over the California State causes of action arose under the doctrine of pendant jurisdiction, 28 U.S.C. § 1367(a) (1998).

The District Court, Hon. A. Andrew Hauk presiding, granted Respondents' motion to dismiss, with leave to amend, on September 22, 1997. Thereafter, Petitioners filed a First Amended Complaint (hereinafter "Complaint"). The district court dismissed the entire Complaint with prejudice, upon Respondents' Motion, pursuant to FED. R. CIV. PROC. 12(b)(6), 12(b)(1), and 9(b).

The Ninth Circuit Court of Appeals, having jurisdiction pursuant to 18 U.S.C. § 1291, affirmed the district court's order.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS TO AFFIRM THE DISMISSAL OF PETITIONERS' CAUSE OF ACTION ASSERTING VIOLATIONS OF THE FEDERAL COMMUNINCATIONS ACT OF 1934 CONFLICTS WITH THE STATUTORY MANDATE OF CONGRESS AND THE DECISIONS OF THE SUPREME COURT.

Justice Scalia, writing for this Court in 1994, made it clear that the FCC was not empowered to "modify" tariff filing requirements to such a degree as to eliminate a filing requirement entirely for common carriers under the Federal Communications Act of 1934 ("the Act"):

> "[O]ur estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the Federal Communications Act of 1934. For better or worse, the Act establishes a rate-regulation filed-tariff system for common-carrier communications...[T]he Commission's desire 'to "increase competition" cannot provide [it] authority to alter the well-established stautory filed requirements.'...[S]uch considerations address themselves to Congress, not to the courts.'...[This] is effectively the introduction of a whole new regime of regulation (or of free-market competition), which may well be a better

> regime but is not the one that Congress established."

MCI v. AT&T, 512 U.S. 218, 234, 114 S.Ct. 2223, 129 L. Ed. 2d 182 (1994).

It is the contention of Petitioners that America Online, Inc. ("AOL") is a "common carrier" within the definition of the Act. For example, 47 U.S.C. § 153(10) provides that "The term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy... ."

Moreover, 47 U.S.C. § 153(43) defines "Telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." "Telecommunications carriers" that offer telecommunications to the public for a fee are treated as "common carriers" under the Act. 47 U.S.C. §§ 153(44), 153(46). Petitioners contend that AOL's status as a telecommunications carrier is indisputable, based upon the services that it actually provides to its subscribers.

This Court has defined a "common carrier" as one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing...A common carrier does not 'make individualized decisions, in particular cases,

whether and on what terms to deal.'" *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701, 99 S. Ct. 1435, 59 L. Ed. 2d 692 (1979) (alterations in original).

A. The "Common Carrier" Nature Of AOL's Offerings To The Public Require Application Of The Federal Communications Act To AOL.

In January, 2000 AOL decided to acquire Time Warner, Inc. in the largest merger ever. AOL Chairman Stephen Case announced, "I don't think it's too much to say this is an historic moment, a time when we transform the landscape of media and communications." At the time, AOL supplied its communications services to more than 20 million monthly subscribers. By acquiring Time Warner, AOL is obtaining cable systems that reach about 13 million households.

AOL provides "Internet Telephony". On May 29, 2000, in a front-page news article about the public's burgeoning use of Internet Telephony, The Los Angeles Times reported the opinion of a telephone industry executive that, "The idea of America Online as a telephone company is not really farfetched". In fact, the Internet telephone service provided by AOL works by breaking up the sounds of callers' voices into a stream of digital packets on networked lines shared with Web page data, music and video. That same news article reported that, earlier in May, 2000, AT & T (the nation's largest long-distance telephone carrier) sharply cut its estimates of revenue growth in part because consumers are moving from basic wired long-distance

to wireless and Internet services at greater rates than anticipated.

AOL provides "AOL-TV". With this service, AOL's telecommunications services merge electronic mail ("e-mail"), real-time subscriber "chatting" and the ability to browse the "world wide web" with traditional television broadcast services. With AOL-TV, a communications box that is connected to a phone or cable line is connected to the user's television receiver. A wireless keyboard allows the television viewer to use AOL's instant-messaging software in order to "chat" with distant viewers in real time.

Subscribers watching live sporting events or other television programs can instantaneously communicate with each other. Eventually, viewers also will be able to instantly purchase products being advertised on the television. In reality, the functional distinctions between telephones, televisions and computers are being eliminated. Digital technology has allowed common carrier and telecommunication forms to improve, interface and enhance functionality.

For example, AOL is working with Motorola to bring instant messaging to telephones using the AOL network. Hand-held computers, such as the Palm Pilot send and receive AOL e-mail via telephone and radio technology. "Smart" telephones now regularly receive AOL transmitted e-mail.

Moreover, it should be recalled that the Internet technology and the computer network that made all of these advances possible were sponsored and advanced

by government funds and research. Many of these public-sponsored benefits, including a portion of the hardware, routers, connectors and interfaces that form the "back-bone" of the world wide web itself, were eventually obtained by AOL.

B. The FCC Has Issued Unreasonably Arbitrary And Inconsistent Opinions.

AOL plays a dominant role as a common carrier of modern telecommunications involving more than 20 million people. Despite this, the Ninth Circuit has now given judicial approval to the FCC's wholesale exemption from the Act to all providers of "enhanced" telecommunications services, while providers of "basic" telecommunications services remain subject to the Congressional tariff filing regulation. In the opinion sought to be reviewed by grant of this Petition, a Circuit Court of Appeals, for the first time since Justice Scalia's pronouncement in 1994, has expressly recognized the FCC's right to create such an exemption from the mandate of Congress. Petitioners contend that only Congress may create such an exemption, and that it has not done so. Instead, the FCC has disregarded plain meanings in the Act and has struggled to find ways to avoid its logical application.

An example of its tortured reasoning is found in the FCC's labored conclusion that e-mail is not a "transmission, between or among points specified by the user, of information of the user's choosing." See *In The Matter Of Federal-State Joint Board On Universal Service*, 13 FCC Rcd. 11501, ¶78 (April 10, 1998). Virtually all modern technology involves electronic

changes unperceived by the user; when one's young child sends an e-mail claiming that you are the best grandparent in the world, what matters is that the precise message that has been sent is the one being received (misspellings and all). In each of these situations, the information sent and the information received are directed by the users, with the content unaffected by the transmission.

The content of services such as an e-mail message, real time chatting and Internet Telephony is "information of the user's choosing". The involvement of digital attachments and computer protocols do not add to or diminish the fact that the sender chooses content. In fact, AOL, in other litigation, has stipulated to this very fact: "There are a number of ways to communicate over the Internet. One such way 'via electronic mail, or "e-mail", comparable in principle to sending first class mail. One can address and transmit a message to one or more other people'." *Cyber Promotions, Inc., v. America Online, Inc.* 948 F.Supp. 456 (E.D. Penn. Nov. 26, 1996). Other AOL offerings, such as real-time Internet discussions, instant-messaging and chat rooms, are so purely within the definition of "telecommunications" common carriage as to defy alternate classification. These acts constitute common carriage, and should be identified as such by this Court, since the FCC refuses to give the Act a rational interpretation.

The FCC attempts to avoid the application of the "common carrier" definition to AOL (despite AOL's provision of services such as e-mail, instant chatting and Internet Telephony) by describing these services as

"enhanced". However, nowhere does the Act provide for an exemption for "enhanced services" provided by common carriers. Instead, this is the FCC's "policy-driven" exemption to the Act favoring certain common carriers, and it runs directly contrary to Justice Scalia's expression of this Court's opinion on the Commission's limited authority to alter the Act. [1]

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[1] In *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C.Cir. 1982) (hereinafter, "*Computer II*"), the D.C. Circuit permitted the FCC's regulatory forbearance ***only*** because the FCC substituted an alternative regulatory scheme over "enhanced" services. *Id.*, at 211. The Court emphasized that its sanction was narrow, saying:

> We emphasize, however, that our sanction is a very narrow one, given in light of the peculiar nature of the communications and data processing industries and the alternative regulatory scheme adopted by the Commission.

Id., at 210. Today, this sanction is no longer valid. First, application of the decision in *MCI v. AT&T*, 512 U.S. 218 calls into question the very permissibility of a regulatory scheme wherein AT&T is the only provider required to sell enhanced services to itself through a separate subsidiary. And second, even if the sanction in *Computer II* were still valid on its face, the FCC is no longer enforcing this requirement, removing the ***only*** basis upon which the FCC's abdication of regulatory oversight was sanctioned by the D.C. Circuit.

C. The Ninth Circuit Has Continued Its Improper Deference To The FCC's Arbitrary Regulatory Exemption For ISPs Engaged In "Common Carrier" Activities.

On June 22, 2000, the Ninth Circuit Court of Appeals issued an opinion which logically supports Petitioners' contentions herein in all respects, except for its continued improper acceptance of the FCC's arbitrary scheme exempting ISPs engaged in "common carrier" activities from the regulatory structure set forth in the Federal Communications Act. In *AT&T v. City of Portland*, ____ F.3d 6747; 2000 U.S.App. LEXIS 14383 (9th Cir. 2000), a Ninth Circuit panel held that AT&T's cable broadband network was "a 'telecommunications carrier,' which the Act treats as a common carrier to the extent that it provided telecommunications to the public, 'regardless of the facilities used.' 47 U.S.C.S. 153(44) & (46)." *Id.*, at 6761.

Despite providing the same functional service that Petitioners unsuccessfully argued were "telecommunications services", in *AT&T v. City of Portland* the same Circuit declared AT&T's internet service provider, @Home, to be a "telecommunications service" subject to the Act. Similar to AT&T's @Home service, AOL's own network is utilized in two ways: Internet data passes *through* its network on a "common carrier" basis, while AOL's proprietary content is retrieved by users with queries *to* AOL's computer data storage facilities.

It has long been established that "one can be a common carrier with regard to some activities but not others." *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C.Cir. 1976). And this fundamental principle has even been accepted by the FCC when it stated, "If a company provides both telecommunications services and information services, it must be classified as a telecommunications carrier." *Re Implementation of Local Competition Provisions*, 11 FCC Rcd. 15499, 15517 (1996). But inexplicably, neither the FCC, nor the Ninth Circuit, are willing to apply these principles to AOL, which engages in "common carrier" activities.

Nonetheless, the Court in *AT&T v. City of Portland* expressly cited to Petitioners' case and distinguished and treated AT&T differently from the AOL internet service that is the subject of this Petition. The Court attempted to justify the basis for this differential treatment in part, as follows:

> Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are one of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a

> telecommunications service as defined in the Communications Act.

Id., at 6762.

If this logic were extended, the Ninth Circuit presumably would find that MCI, Sprint and AT&T would no longer be "common carriers" under the Act because they do not control the entirety of facilities "from end to end". In fact, local exchange carriers connect long distance phone companies to consumers through the local exchange carriers' networks. A differential distinction between common carriers that is based upon ownership of the transmission network is found nowhere in the Act, and is contrary to this Court's own decisions that the FCC may not exempt resellers of "common carrier" services, many of which own no facilities whatsoever, from the tariff-filing requirements of the Act. *MCI v. AT&T*, 512 U.S. 218; *AT&T v. Centraloffice Telephone, Inc.*, 524 U.S. 214, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998). The result of the Ninth Circuit's reasoning is that telephone companies and broadband operators are made subject to the Act but ISPs are not. As a result, the world's largest ISP, AOL, provides telecommunications services for, and imposes terms of service upon, more that 20 million consumers of the nation's telecommunication network, all while "exempted" from an act of Congress that does not provide for its exemption.

Is AOL now such a "sacred cow" that our courts should create a policy that ignores a Congressional enactment requiring a minimally intrusive means of tariff posting? Is AOL to continue to be permitted (as part of its adhesive Terms of Service, without any tariff

posting pursuant to the Act) to obtain such benefits as a perpetual license to reproduce all copyrighted and intellectual property posted by subscribers in any electronic "public place"? Are latter-day Picassos, doodling the outline of a modern "Guernica" on an AOL "bulletin board", or budding Robert Frosts, communicating in their "chat rooms" about whether there are "miles" or "hours" to go before they sleep, unwittingly required to grant AOL commercial reproduction rights to their intellectual property? That is exactly what AOL has claimed in its electronic contracts.

AOL provides a fundamental and important telecommunications service. One of the instant petitioners, Kathryn Paraventi, was dependent on an AOL "chat room" and e-mail for information about the availability of organ transplants for her liver when, in 1996, AOL unilaterally converted to its flat fee program which caused modem overload due to user demand.

On October 29, 1996, AOL announced that it would begin pricing the AOL enterprise offering at $19.95 for "unlimited" access. When AOL announced the move to a Flat Fee Pricing Plan on October 29, 1996, AOL was aware that it could not provide adequate service. AOL was already experiencing problems with overloaded networks, a simple case of too many subscribers dialing into too few available modems. As of November of 1996, AOL had approximately 6 million members. At the same time, AOL had approximately 200,000 incoming lines connected to modems. The user to modem ratio at that time was roughly 30 to 1 (30:1). The industry standard amongst

Internet Service Providers for user to modem ratio at and about that time was 9.26:1.

This fiasco caused more than mere inconvenience to millions of Americans. As a result of AOL's private calculation, Ms. Paraventi could not gain access to the organ transplant support group "chat room" or the AOL subscribers upon whom she relied, since they could be reached only through AOL. It is beyond debate that AOL actually knew that its modems were woefully insufficient to provide service for the added phone traffic. Such a fundamental common carriage telecommunication service must not be subject to disruption or burden, without any public notice, hearing or warning, whenever AOL unilaterally decides that more reliable, or less profitable, telecommunication services should terminated or that subscribers' terms of service must be altered materially.

Petitioners believe that the Federal Communications Act provides the proper balance between the public interest and the growth of AOL. Only Congress, not the FCC or the courts, has the authority to re-write the Act.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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